No. 11,860

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE FONG FOOK,

Appellant,

vs.

I. F. WIXON, District Director, Immigration and Naturalization Service, Port of San Francisco,

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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THE FACTS.

Appellant arrived at the port of San Francisco, California, on August 25, 1947, and applied for admission into the United States as a native-born citizen. At that time he presented United States Passport No. 159067 issued to him by the Department of State before his departure for China. He also presented a certified copy of a decree of the Superior Court of the State of California, in and for the City and County of San Francisco, dated August 14, 1944, purporting to establish the fact that he was born on the 6th day of April 1901 in San Francisco, said decree having been issued under the provisions of the Health and Safety

Code of the State of California. (Sections 10600, et seq.) In addition, appellant presented an honorable discharge from the armed services of the United States covering service therein from September 23, 1942 to February 10, 1943. The certificate of discharge recites that he was born in San Francisco, California, and was 41½ years of age at the time of enlistment.

The examining Immigrant Inspector, not being satisfied clearly and beyond a doubt that appellant was born in the United States as claimed, referred the case to a Board of Special Inquiry in accordance with 8 U.S.C. Section 152. Hearings were thereupon conducted before the Board of Special Inquiry on a number of different days in October and November, 1947, at all of which appellant was represented by counsel of his own choosing.

At the hearings before the Board of Special Inquiry, the appellant testified, as did his wife, whom he had recently married in China, and the witness who had appeared in his behalf in the State Court proceeding to establish the fact of birth.

The testimony before the Board raised an issue as to whether appellant had in fact been born in the United States. On December 1, 1947, the Board of Special Inquiry found that appellant was an alien, a citizen of China, and voted to deny him admission into the United States on the ground that he was an alien immigrant without an immigration visa. (Immigration Act of 1924, Section 13(a), 8 U.S.C. Section 213.)[1]

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[1] 8 U.S.C. 213. No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa * * *.

Thereafter on December 1, 1947, appellant entered an appeal to the Attorney General. (8 U.S.C. 153.) Appellant did not prosecute this appeal, however, but on December 8, 1947, filed a petition for a writ of habeas corpus in the Court below. In this petition appellant alleged that he was an American citizen by birth, and that the present appellee was unlawfully restraining him of his liberty. For the purpose of inquiring into the cause of the alleged restraint of liberty (28 U.S.C. 452) the Court issued a writ of habeas corpus and directed the present appellee to produce the body of appellant at a date fixed in the writ. Appellee complied with the writ and also filed a return in which the proceedings of the Board of Special Inquiry (Exhibit A) and the evidence there considered were set out. Appellant's counsel filed an affidavit in support of appellant's application for release pending the administrative proceedings before the Immigration authorities, and the cause was submitted upon the petition, the return, and the traverse thereto, counsel's affidavit and briefs to be filed, all of which were before the Court below. (Tr. pp. 27, 28, 29 and Exhibit A, pp. 1, 57, 58, 59.)

The Court below refused to grant unconditional release to appellant, holding that the decree of the State Court was not conclusive on the Government and that appellant was required to exhaust his administrative remedies before invoking a review by the Courts of the administrative proceedings and decision. The Court, however, did order appellant's release pending final decision in the administrative proceedings, upon his filing a bond in the sum of $1000.00.

THE QUESTION.

The basic question presented in this case is whether or not an order of the Superior Court of the State of California, in and for the City and County of San Francisco, purporting to establish the place of birth of the appellant (Sections 10600 et seq. Health and Safety Code of the State of California) is conclusive upon the Immigration authorities of the United States in their administration of the Immigration Acts of February 5, 1917 (8 U.S.C. 132 et seq.) and May 26, 1924 (8 U.S.C. 201 et seq.)

If that decree is binding and conclusive upon the United States, appellant was entitled to unconditional discharge in the Court below. If, on the other hand, that decree is not binding and conclusive on the United States, then appellant obviously must exhaust his administrative remedies before the Courts may examine the administrative decision on habeas corpus.

SUMMARY OF ARGUMENT.

(1) The petition for writ of habeas corpus was premature.

At the time the appellant filed his petition for a writ of habeas corpus in the Court below, he had not exhausted his administrative remedies in that, having given notice of appeal from the decision of the Board of Special Inquiry finding that he was an alien, he failed to perfect his appeal.

The question as to where appellant was born is a question of fact, not a question of law. Questions of

fact are properly determinable by the Board of Special Inquiry.

Even though, as appellant argues, the order of the Superior Court of the State of California, in and for the City and County of San Francisco, dated August 14, 1944, purporting to establish a record of birth of appellant in the State of California, be regarded as *prima facie* evidence of such birth, it is not necessary to make a determination of the matter at this time as the appellant has not exhausted his administrative remedies.

Therefore, the petition for a writ of habeas corpus in the Court below was premature, and was properly denied by the Court.

(2) The Order of the Superior Court of the State of California, in and for the City and County of San Francisco, is not conclusive upon the United States.

The order of the Superior Court of the State of California in and for the City and County of San Francisco, dated August 14, 1944, purporting to establish the record of appellant's birth in the State of California, is not conclusive against the United States, as a federal question is involved, and the United States was not a party to the proceeding in the Superior Court.

ARGUMENT.

(1) THE PETITION FOR A WRIT OF HABEAS CORPUS WAS PREMATURE.

The instant appellant has not yet had his right to enter the United States finally determined by the proper administrative officials. The Courts have uniformly held that they will not interfere in an administrative proceeding until the person seeking relief therefrom has exhausted his administrative remedies and final action has been taken thereon by the proper administrative authorities. In immigration matters, 8 U.S.C. Sections 152 and 153[2] provide for an appeal from an excluding decision by a Board of Special Inquiry to the Attorney General of the United States.

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[2]8 U.S.C. 152. * * * Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. In the event of rejection by the board of special inquiry, in all cases where an appeal to the Attorney General is permitted by this chapter, the alien shall be so informed and shall have the right to be represented by counsel or other adviser on such appeal. * * *

8 U.S.C. 153. * * * Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. * * * In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General. * * *

In

Impiriale v. Perkins, Secretary, Department of Labor (decided June 30, 1933, in the Court of Appeals, Dist. of Columbia), 66 Fed. (2d) 805, cert. denied 290 U. S. 690,

the Court said:

> "But, since deportation proceedings are administrative and the action of the Secretary of Labor is intended by the statutes to be final, there is no regulatory power in the courts to control the course of such proceedings while pending in that department.
>
> "The jurisdiction of the courts is contingent and usually to be exercised by a writ of habeas corpus ex post facto of an order of deportation."

While there appears to be no such specific provisions in the Rules of this Court, it is enlightening to note that the New York District Court rules provide as follows:

> "RULE XIV(b) Writs shall not be allowed unless the petition shows in exclusion cases that the alien has appealed from an order of exclusion of a Board of Special Inquiry, and that the Secretary of Labor has affirmed the exclusion and ordered the alien deported. * * *"

In

United States ex rel. Loucas v. Commissioner of Immigration (decided D.C. N.Y. May 5, 1931), 49 Fed. (2d) 473,

it is stated:

> "That rule (Rule XIV, supra) embodies the normally appropriate attitude of the federal

courts vis-a-vis the executive branch of the government * * *. Ordinarily, it would be insupportable for the courts thus to interfere ad interim with the enforcement of our laws by the appropriate executive department. Administrative redress should always be exhausted before recourse is had to the courts."

In

United States ex rel. Petersen, et al. v. Comm'r of Immigration (D.C. N.Y.), decided Nov. 11, 1932, 1 Fed. Supp. 735,

the Court said:

"Furthermore, on general principles courts should not interfere with the executive in regard to any matter until the executive has made its final decision, and then only if that decision transcends the scope of executive power by reason of illegality implicit in its nature or in the method of its exercise." (Citing *Mara v. U. S.* (D.C. N.Y. 12-30-31), 54 Fed. (2d) 397, 399).

See, also,

United States v. Parson, 22 F. Supp. 149,

to the same effect.

That the Courts may not intervene on habeas corpus until the administrative processes of hearing before the local immigration authorities and appeal to the Commissioner have been completed appears to be settled by the case of

United States v. Sing Tuck, 194 U. S. 161, 48 L. Ed. 917,

wherein the Court said:

> "* * * it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way.
>
> "* * * before the courts can be called upon, the preliminary sifting process must be gone through with."

In the brief filed by amicus curiae in support of appellant, it is argued that it is futile for him to exhaust his administrative remedies. (Br. amicus curiae, p. 32.) How can he anticipate, however, what decision might be made on the evidence in this case until acted upon by proper authority? The reviewing authority might, in fact, find him to be a citizen of the United States and entitled to enter this country. His statement that it would be futile to exhaust his administrative remedies is, therefore, a mere conclusion on the part of appellant. In any event, it is apparent that he must exhaust his administrative remedies.

Impiriale v. Perkins, 66 F. (2d) 805, 290 U. S. 690, cert. denied, supra.

The question as to where appellant was born is a question of fact. Questions of fact are properly determinable by the tribunal authorized by law to determine the same, in this case the Immigration Board of Special Inquiry. Needless to say, if the appellant was actually born in the State of California, we concede that he would then be a citizen of the United States under the provisions of the Fourteenth Amendment to the United States Constitution. BUT WAS HE ACTUALLY BORN THERE? In considering the evidence to establish the fact of birth, the Board

of Special Inquiry is, in the first instance, the one to determine the question as to whether or not a document presented to it has been fraudulently procured, and, indeed, as in the instant case, where there are earmarks of fraud, it was its duty to inquire into the matter.

In

Lee Lung v. Patterson, 186 U. S. 168, 22 Sup. Ct. 795, 46 L. Ed. 1108,

at page 175, the Supreme Court said:

> "But jurisdiction is given to the collector over the right of the alien to land, and necessarily jurisdiction is given to pass on the evidence presented to establish that right. He may determine the validity of the evidence, or receive testimony to controvert it, and we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper."

In

United States ex rel. Grau v. Uhl, 262 F. 532,

the Court said:

> "Where, therefore, a question of fact is involved, the statutory remedies and appeals must first be exhausted before this Court will entertain an application for a writ of habeas corpus.
>
> "As the petition shows on its face that petitioner has not taken his appeal to the Secretary of Labor, as provided by Section 17, the application is denied."

Consider the situation where an applicant admits to the Board of Special Inquiry that he secured his Order Establishing Fact of Birth by fraud upon the Court, and that he actually was born in China, as happened in the cases of *United States v. Chin Siu Hong* (Eddie Lam Chin) prosecuted in the United States District Court, Northern District of California, Southern Division, No. 31,122-H (January 8, 1948) and *Eng Yee* prosecuted in the Superior Court of the State of California in and for the City and County of San Francisco, No. 41,340 (April 20, 1948). Would the Court go so far as to say that the Board of Special Inquiry, under such circumstances, should nevertheless admit the applicant as a citizen of the United States?

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(2) THE ORDER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO IS NOT CONCLUSIVE UPON THE UNITED STATES.

In analyzing this matter, we have to consider the sovereign power of the United States. It has been fully established that the United States can only be sued by its own consent clearly given by legislative act.

State of North Dakota ex rel. Lemke v. Chicago N. W. Ry. Co., 42 S. Ct. 170, 257 U. S. 485, 66 L. Ed. 329;

Turner v. U. S., 39 S. Ct. 109, 248 U. S. 354, 62 L. Ed. 291 (aff. 51 Ct. Cl. 125);

Stanley v. Schwalby, 16 S. Ct. 754, 162 U. S. 255, 40 L. Ed. 960;

U. S. v. Gleeson, 8 S. Ct. 502, 124 U. S. 255, 31 L. Ed. 421;

U. S. v. Lee, 1 S. Ct. 240, 106 U. S. 196, 26 L. Ed. 171;

Carr v. U. S., 98 U. S. 433, 25 L. Ed. 209;

Hill v. U. S., 9 How. 386, 13 L. Ed. 185;

U. S. v. Clarke, 8 Pet. 436, 8 L. Ed. 1001;

Kelly v. U. S., 59 F. (2d) 743,

and other cases.

The United States does not ordinarily consent to be sued in a State Court.

Stanley v. Schwalby, 16 S. Ct. 754, 162 U. S. 255, 40 L. Ed. 960;

Moon v. Hines, 87 So. 603, 205 Ala. 355, 13 A.L.R. 1020;

Obrecht v. Vinyard, 114 A. 168, 12 Del. Ch. 350;

Petition of Albrecht, 233 N.Y.S. 383, 225 App. Div. 423 (aff. 230 N.Y.S. 543, 132 Misc. 713, and affirmed 171 N. E. 772, 253 N. Y. 537).

It is realized that these cases relate to suits. It would seem, however, by analogy, that the United States can not be made a party to a proceeding in a State Court without its consent. It would also appear that it is permanently established that where a federal question is involved, the Federal Courts administer the national law as established by the Federal Constitution, Treaties and Statutes, regardless of State law.

Prudence Realization Corporation v. Geist (N. Y.), 62 S. Ct. 978, 316 U. S. 89, 86 L. Ed. 1293;

American Surety Co. of N. Y. v. Bethlehem Nat. Bank of Bethlehem (Pa.), 62 S. Ct. 226, 314 U. S. 314, 138 A.L.R. 509, 86 L. Ed. 241;

Deitrick v. Greaney (Mass.), 60 S. Ct. 480, 309 U. S. 190, 84 L. Ed. 694, reversing, CCA 103 F. (2d) 83, modifying D. C.;

Deitrick v. Greaney, 23 F. Supp. 758, cert. granted, 60 S. Ct. 104, 308 U. S. 535, 84 L. Ed. 451, cert. denied *Greaney v. Deitrick,* 60 S. Ct. 104, 308 U. S. 582, 84 L. Ed. 488, rehearing denied *Deitrick v. Greaney,* 60 S. Ct. 611, 309 U. S. 611, 309 U. S. 697, 84 L. Ed. 1036.

It is still the rule, as it has always been, that Federal Courts are not bound by State Court decisions affecting Federal questions:

Garvey v. Wilder (CCA Ill.), 121 F. (2d) 714;

Niagara Hudson Power Corporation v. Hoey (CCA N. Y.), 117 F. (2d) 414, affirming D. C., 34 F. Supp. 302, and cert. denied, 61 S. Ct. 958, 313 U. S. 571, 85 L. Ed. 1529;

Illinois Central R. Co. v. Moore (CCA Miss.), 112 F. (2d) 959, reversing *D. C. Moore v. Illinois Central R. Co.,* 24 F. Supp. 731, cert. denied, 61 S. Ct. 392, 311 U. S. 643, 85 L. Ed. 410, reversed on other grounds, 61 S. Ct. 754, 312 U. S. 630, 85 L. Ed. 1089;

Commercial Credit Co. v. Davidson (CCA Miss.), 112 F. (2d) 54;

Wisdom v. Keen (CCA Miss.), 69 F. (2d) 349;

In re Chicago R. I. and P. Ry. Co. (D. C. Kan.), 28 F. (2d) 56, affirmed CCA.

On many occasions the Federal Courts have refused to enforce the provisions of State Statutes where they obstructed Federal rights.

Commissioners of Sinking Fund of Louisville v. Anderson (D. C. Ky.), 20 F. Supp. 217, affirmed for plaintiff, CCA 110 F. (2d) 961, cert. denied *Commissioners of Sinking Fund of City of Louisville v. Anderson,* 61 S. Ct. 28, 311 U. S. 669, 86 L. Ed. 429;

American Bonding Co. v. Anderson (D. C. Ky.), 20 F. Supp. 217, reversed on other grounds for defendant (CCA), 110 F. (2d) 961.

In the instant case, involving as it does, the question of aliens, it is proper to note that Federal Courts have refused to follow the State law on Federal questions pertaining to aliens.

Ex parte Petterson, 166 Fed. 536 (D. C. Minn.).

This was a deportation case, and the Court stated in arriving at a decision in the matter, that it had taken into consideration Section 721 of the Revised Statutes of the United States (U. S. Compiled Statutes 1901, p. 581; Title 28 USCA Sec. 725), reading as follows:

"The laws of the several states, except where the Constitution, treaties or statutes of the

> United States otherwise require or provide, shall be regarded as the rule of decisions in trials at common law, in the courts of the United States, in cases where they apply,"

and the Court goes on to state:

> "It has been held by the Supreme Court of the United States that there is nothing in this section which required it to be applied to proceedings in equity or in admiralty, and that it is not applicable in criminal cases cognizable before the United States Courts, *or where the Constitution, treaties, or statutes of the United States require other rules of decision.* Bucher v. Cheshire R. Co., 125 U. S. 583, 8 Sup. Ct. 974, 31 L. Ed. 795; Clark v. Allen (D. C.), 114 Fed. 374; Logan v. U. S., 144 U. S. 300, 12 Sup. Ct. 617, 36 L. Ed. 429." (Italics supplied.)

In

> *United States v. Candelaria, et al.,* 271 U. S. 432,

the Supreme Court of the United States said, in substance, that the United States is not bound by a judgment in a State Court where a federal question is involved and the United States is not a party thereto.

> *Bowling and Miami Improvement Co. v. U. S.,* 233 U. S. 528, 534;
> *Privett v. U. S.,* 256 U. S. 201, 204;
> *Sunderland v. U. S.,* 266 U. S. 226, 232.

The United States is not bound by a proceeding in a State Court involving a federal question where it

was not a party to the proceeding and had no notice thereof.

U. S. v. Candelaria, et al., supra;
U. S. v. Moser, 266 U. S. 236;
Bowling v. U. S., 256 U. S. 201;
Sunderland v. U. S., 266 U. S. 226.

The service of notice of the proceeding upon the District Attorney for the City and County of San Francisco, California, was not upon the United States as it is obvious that he does not represent the United States, but solely the City and County of San Francisco, State of California.

In

Economy Light & Power Co. v. U. S., 256 U. S. 113, at p. 123, 65 L. Ed. 847,

the Court stated:

> "Our attention is called to the fact that in People ex rel v. Economy Light & Power Co., 241 Ill. 290, pp. 320 to 338, 89 N. E. 760, the Supreme Court of Illinois held that the Des Plaines in its natural condition is not a navigable stream; and it is intimated that we ought to follow that decision. A writ of error brought to review it was dismissed by us because *no federal question was involved.* (234 U. S. 497, 510, 524; 58 L. Ed. 1428, 1434, 1439; 34 S. Ct. 973.) Of course the decision does not render the matter res judicata as the United States was not a party. The District Court in the present case treated it as not persuasive, because it appeared that evidence was wanting which is present here; and it cannot be said that the Court below erred in not following it." (Italics supplied.)

In

Lorber v. Vista Irrigation District, 137 F. (2d) 628,

where the Reconstruction Finance Corporation was a party neither to proceedings in State Court by Bondholders of Irrigation District, to compel levy of assessments and payment of accrued interest on bonds, nor to proceeding in bankruptcy for composition of district's debts, no question of *res judicata* based on State Court proceeding could arise against the Reconstruction Finance Corporation in a proceeding in bankruptcy.

It is interesting to note the following statements in the majority opinion in the case of

Dred Scott v. John F. A. Sandford, 60 U. S. 393, 15 L. Ed. 691, 10 How. 393-633,

"In discussing this question, we must not confound the rights of citizenship which a state may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States." (p. 700.)

"Consequently, no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a State under the federal government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and the laws of the State attached to that character.

> "It is very clear, therefore, that no State can by any Act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it." (p. 701.)

In the concurring opinion of the Honorable Justice Grier, it was stated:

> "If the rights and immunities connected with or practiced under the institutions of the United States can by any indirection be claimed, or deduced from sources or modes other than the Constitution and laws of the United States, it follows that the power of naturalization vested in Congress is not exclusive—that it has in effect no existence, but is repealed or abrogated." (p. 732.)

And reading from the dissenting opinion of the Honorable Justice McClean in the same case, it is stated:

> "In Chirac v. Chirac, 2 Wheat., 261 (15 U. S.) this Court says: 'That the power of naturalization is exclusively in Congress, does not seem to be, and certainly ought not to be, controverted.' No person can legally be made a citizen of a State, and consequently a citizen of the United States, of foreign birth, unless he be naturalized under the Acts of Congress. Congress has power 'to establish a uniform rule of naturalization'.

"It is a power which belongs exclusively to Congress, as intimately connected with our federal relations. A state may authorize foreigners to hold real estate within its jurisdiction, but it has no power to naturalize foreigners, and give them the rights of citizens. Such a right is opposed to the Acts of Congress on the subject of naturalization, and subversive of the federal powers. I regret that any countenance should be given from this bench to a practice like this in some of the States, which has no warrant in the Constitution." (p. 754.)

The authority of the United States to enforce the powers delegated to it by the respective States can not be impaired by any action without its consent.

Bowling and Miami Improvement Co. v. U. S., 233 U. S. 528, p. 534;

Privett v. U. S., 256 U. S. 201, 204;

Sunderland v. U. S., 266 U. S. 226, 232.

Black on Judgments (Sec. 792) has this to say on Judgments *Quasi in Rem:*

"Much of the uncertainty and confusion in the definitions of proceedings in rem has arisen from the attempt to make that term cover various classes of actions which are not strictly and purely in rem, although they exhibit some points of analogy or resemblance to the proceedings which fall within the narrower use of the phrase. It is better to distinguish between proceedings in rem and proceedings quasi in rem. The latter are assimilated to the former in some particulars,—as, in respect to the manner of acquiring jurisdic-

tion—but are not always attended by the same consequences—in respect, for example, to the persons bound by the adjudication. To make this more plain, we extract the following description of the two classes from a well considered opinion of the United States Supreme Court: 'Actions in rem, strictly considered, are proceedings against property only, treated as responsible for the claims asserted by the libelants or plaintiffs. The property itself is in such actions with the defendant, and, except in cases arising during the war, for its hostile character, its forfeiture or sale is sought for the wrong in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The Court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case. There is, however, a large class of cases which are not strictly actions in rem, but are frequently spoken of as actions quasi in rem, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. * * * But they differ, among other things, from actions which are strictly in rem, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties."

Freeman v. Alderson, 119 U. S. 187, 7 Sup Ct. 165, 30 L. Ed. 373 (Black on Judgments, Vol. II, see pp. 1200-1201).

Further, a judgment *in rem* of a domestic as well as a foreign Court, where jurisdiction over the person of a party has not been obtained, except as to his interest in the property affected by the judgment, is not conclusive or binding upon him by way of estoppel in another action.

Durant v. Abendorth, 97 N. Y. 132;
Toby v. Brown, 11 Ark. 308.

The Courts seem to agree that inquisition of lunacy, especially if retrospective, is not conclusive evidence, though it may be *prima facie* against persons who are not specifically made parties to the proceeding.

Rogers v. Walker, 6 Pa. 373, 47 Am. Dec. 470;
Den ex dem Aver v. Clark, 10 N. J. Law 217, 18 Am. Dec. 417 (citing *Sergeson v. Sealey,* 2 Atk. 412);
Ex parte Barnsley, 3 Atk. 184;
Hall v. Warren, 9 Ves. 603;
Faulder v. Silk, 3 Camp. 126;
Thomasson v. Kercheval, 10 Humph. (Tenn.) 322;
Hughes v. Jones, 116 N.Y. 67, 22 N.E. 446, 5 L.R.A. 637, 15 Am. St. Rep. 386.

State laws and decisions cannot determine for the national Courts what constitute sufficient process of law, sufficient service of process, or sufficient appearance of parties, but they must exercise their independent judgment in deciding these questions, not-

withstanding the full faith and credit provision of the Constitution.

> *Michigan Trust Co. v. Ferry,* 175 Fed. 667; 99 C.C.A. 221, 175 Fed. 681, 99 C. C. A. 235 (reversed on other grounds), 278 U.S. 346, 33 S.Ct. 550, 57 L.Ed. 867.

In the case of

> *Negro John Davis et al. v. Wood* (decided in 1816), 1 Wh. 6, 4 L.Ed. 22,

the Court held that a finding as to a status of slavery in a State Court was not *res judicata* as to persons who were not parties to the action.

It is undoubtedly true, as stated by the Court below, in its opinion, that decisions in naturalization cases are upon an entirely different ground, as Congress has entrusted to the State Courts the power to hear and determine petitions of that nature (54 Stat. 1140, 8 U.S.C. 701). Naturally, in such a case, a decree would be fully binding upon the United States and could only be attacked in the manner provided by Federal Statute (8 U.S.C. 738). (Tr. p. 30.)

It would appear further than an Order of the Superior Court purporting to establish the place of birth of a person may be some evidence of the appellant's birthplace. The Court below in its opinion (Tr. p. 31) has stated the matter succinctly:

> "In my opinion the decree of the state court is evidence of petitioner's birthplace but not conclusive proof of his citizenship. The United States has the full right to inquire into the facts upon which American citizenship is claimed, when entry into the United States is sought; and the

> burden of proving that citizenship is upon the person seeking entry.[3] If this were not so, the doors would be wide open to fraud upon the part of entrants in the claim of citizenship or fraud in obtaining state decrees as to birth.[4] (Lee Leong v. U.S. 217 Fed. 48; Ex parte Lee, 49 F. (2d) 486.)"

Such an order, however, obviously cannot be *conclusive* upon the United States, and the weight of the order as evidence is a matter to be considered in the first instance by the administrative authorities on appeal from the excluding decision of the Board of Special Inquiry.

Petitioner claims that because of the issuance of the order of the Superior Court in San Francisco, establishing the fact of birth, the Government is bound to concede that he is a citizen of the United States. This law merely provides a method for the making of a delayed registration of birth. (Sections 10600 to 10607, inclusive, Health and Safety Code, State of California.) (See Appendix.) The proceeding was entirely ex parte and the United States was not a party thereto. As previously set forth in this brief, it would appear that the United States cannot be sued without its consent, evidenced by an Act of Congress,

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[3]Upon his attempted entry, petitioner was subject to the immigration laws as if he had never resided in the United States. (*U. S. ex rel. Stapf v. Corsi*, 287 U.S. 129.)

[4]The record here shows that the sole witness for the petitioner in the State Court proceedings to establish birth, there testified to having seen petitioner immediately after he was born in San Francisco in 1901. This same witness later testified before the immigration authorities that he saw petitioner for the first time in 1911 or 1912 when the latter was about three or four years old.

and, obviously, it cannot be bound by a decree obtained in a State Court in an ex parte proceeding of the type here under discussion.

As a matter of fact this very same question was considered by the Honorable A. F. St. Sure, Judge of the United States District Court, in a deportation case tried by the Court below several years ago on appeal from a deportation order entered by the United States Commissioner, viz.: *United States v. Jew Ben On* (No. 26172-S). In that case the defendant produced an order establishing the fact of birth issued by the Superior Court of the State of California in and for the City and County of San Francisco, just as the present appellant has done. The United States offered evidence in an attempt to show that the defendant had not in fact been born in San Francisco as indicated in the decree of the said Superior Court. After full hearing and argument, Judge St. Sure affirmed the order of the U. S. Commissioner that the defendant be deported. Subsequently defendant gave notice of appeal to this Court, but abandoned the same. Unfortunately the Court did not write an opinion in the case.

We can think of no more striking illustration of the soundness of the doctrine that the United States cannot be bound by an order of a State Court obtained in an ex parte proceeding than the situation which was disclosed in the *Jew Ben On* case, and the more recent case of

U. S. v. Chin Siu Hong (Eddie Lam Chin), No. 31122-H (D.C. N.D. Calif.),

in which the Federal Grand Jury for this district indicted the subject for fraud, false claim of citizenship and perjury in connection with the presentation to the Immigration authorities of an "Order Establishing Fact of Birth" issued by the Superior Court of the State of California, in and for the City and County of San Francisco, similar to the order involved in the instant case, and in which defendant was sentenced to imprisonment for the term of eighteen months in a penitentiary to be designated by the Attorney General of the United States.

The exclusive power to regulate immigration is conferred upon the United States by Article I, Section 9, Clause 1 of the Constitution of the United States. No State statute passed by any sovereign State can, in any way, interfere with the power so granted by Congress. Legislation, similar to Sections 10600 to 10607, inclusive, Health and Safety Code, State of California, cannot directly or indirectly interfere with such power of Congress to regulate immigration when an immigrant presents himself at the port of entry seeking admission into the United States.

In 1911, the Territorial Legislature of Hawaii passed an Act providing for the issuance of Certificates of Hawaiian birth, and permitted the issuance of such certificates by the Secretary of State of Hawaii on proof satisfactory to him of the facts of such birth. (Sec. 196, Ch. 21, Revised Laws of Hawaii, Revision of 1929.) The then Secretary of Labor, John G. Sargeant, presented to the Attorney General, the ques-

tion as to whether or not these Hawaiian birth certificates, not being like contemporaneous records of birth, were of such weight as to prevent immigration officials from detaining the holders of such certificates for the purpose of determining whether they were citizens of the United States or inadmissible as aliens. In his opinion, reported in Vol. 35, Opinions of the Attorneys General, at page 71, et seq. he states:

> "It is plain, I think, that the presentation of such a certificate to an immigration inspector does not deprive him of the power or absolve him from the duty to determine for himself the right of the person presenting the certificate to enter the United States. Whenever a person seeks to enter the United States, the first question which arises is that of his citizenship, a question of fact. The immigration laws impose upon the officials of your Department the duty of deciding that question, and pending its decision to detain the person. (U.S. v. Sing Tuck, 194 U.S. 161.)
>
> A certificate of Hawaiian birth is not like a contemporaneous record of birth. It is merely an expression of the conclusion of the Secretary of Hawaii on a matter submitted to him for decision. The legislature of the Territory of Hawaii has no power to prescribe what effect shall be given by immigration officers of the United States to a finding or opinion of the Secretary of Hawaii in a matter which Congress has left to the decision of the officers of the United States, and it does not appear that the Legislature of Hawaii has attempted to do so. The provision that the certificates shall be prima facie evidence of the facts therein stated may control officers and tribunals of the Territory in matters within their

jurisdiction, but does not prescribe a rule of evidence for immigration officers of the United States. That a certificate of this kind, issued by the Secretary of Hawaii, is not controlling upon the officers of your Department was decided by the Circuit Court of Appeals for the Ninth Circuit in *Lee Leong v. United States,* 217 Fed. 48, and that decision should be treated as binding until overruled. So I advise you that persons presenting such certificates may be detained by the Immigration officers for the purpose of determining whether they are citizens or inadmissible aliens, for such certificates are not controlling."

In

Lee Leong v. United States, 217 Fed. 48,

this Court was called upon to decide whether or not a Hawaiian birth certificate precluded the immigration officers from detaining the holder of such a certificate under the provisions of the immigration laws to determine whether or not he was in fact a citizen of the United States or an alien inadmissible to this country. In that case, the petition for the writ, which was filed in the District Court, alleged that the petitioner was born in the Territory of Hawaii January 21, 1888, of Chinese parents there residing; that about four years later he was taken by his parents to China and there remained until February, 1913, when he left for Honolulu; that on February 21, 1912, the Secretary of the Territory of Hawaii, after application and upon due hearing, as provided by law, issued a certificate certifying that the applicant was born in the Hawaiian Islands on or about January 21, 1888. The petition further alleged that the appellant was given but the

semblance of a hearing before the immigration officials to determine whether he should be allowed to land and that said hearing was not a fair and bona fide hearing, but that the proceedings were conducted in an illegal and improper manner, and not in accordance with the Acts of Congress. Upon the hearing, testimony of witnesses was taken and the immigration officers denied the right of appellant to land, and ordered him deported to China. On page 49, this Court said:

> "But counsel for the appellant urge that the decision was contrary to law, in that the immigration officers denied to the certificate of birth that consideration which in law it was entitled to receive. The certificate was issued under the Act of the Legislature of Hawaii approved April 17, 1911, which provides in substance that the Secretary of the Territory of Hawaii may, whenever satisfied that any person was born within the Hawaiian Islands, cause to be issued to such person a certificate showing that fact. It provides that the application shall be on sworn petition and accompanied by affidavits of witnesses, and that the Secretary may examine under oath any applicant or persons cognizant of the facts regarding the application, and it further provides that any certificate so issued shall be prima facie evidence of the facts therein stated.
>
> Two grounds may be suggested on which it should be held that there was no error in denying to the certificate a controlling effect on the hearing. *In the first place, no act of the Territory of Hawaii can avail to affect the laws of the United States in regard to the emigration of aliens.* Williams v. United States, 137 U.S. 113,

11 Sup. Ct. 43, 34 L. Ed. 590. In the second place, assuming that the certificate of the secretary of the Territory of Hawaii was, as the law declared it to be, prima facie evidence of the facts recited, there is in the record ample evidence to justify the immigration officers in ruling that prima facie presumption was overcome. This was the conclusion of the Court below, and we find no error therein. Lee Lung v. Patterson, 186 U.S. 168, 22 Sup. Ct. 795, 46 L. Ed. 1108." (Italics supplied.)

In

Lee Lung v. Patterson, supra,

the question was raised as to the right of Lee Lung's family to enter the United States at the Immigration port of entry upon presentation of travel documents issued by the Registrar General of Hongkong pursuant to treaty provisions. At page 175, the Supreme Court said:

"It is urged that the statute makes the certificates evidence, and that the collector had no power to disregard the certificates, and 'whether he did not consider them at all and did not pass upon their validity or invalidity, as in either view of the case, we respectfully submit the collector is not chargeable merely with error, in which event his decision is not reviewable by the Court, but with the more serious charge of having exceeded his jurisdiction, in which case, we submit, his decision is reviewable.'

"But jurisdiction is given to the collector over the right of the alien to land, and necessarily jurisdiction is given to pass on the evidence presented to establish that right. He may determine the validity of the evidence, or receive testimony

> to controvert it, and we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper."

A birth certificate not filed contemporaneously with the birth of the person named therein, but many years afterwards, is not entitled to be given the weight of a birth certificate executed at the time of birth. The matter of the weight to be given to such a birth certificate was passed upon in

> *Ex parte Wilson Seen Lee* (D.C. Wash.), 49 F. (2d) 468,

by Judge Neterer on October 16, 1930, in which he states:

> "The birth certificate filed fourteen or fifteen years after the birth is of no probative value, Nagle v. Dong Ming (CCA) 26 F. (2d) 438; and pregnant is this conclusion as to the fact by the statement of the doctor that he had no data from which to register this birth and that no one caused him to register it at that late date, and that he did not know the party registered, nor have any record in his possession to show the birth."

The failure of the Commissioner of Immigration and the Secretary of Labor to recognize this certificate was upheld by the Court.

Recognizing that Federal Agencies might have occasion to question the United States citizenship of persons claiming same, Congress saw fit to provide under Section 503 of the Nationality Act of 1940

(8 U.S.C.A. 903)[5] a method whereby a person claiming United States citizenship and whose claimed citizenship was denied by any department, or agency, or executive official thereof, might procure a judicial determination of such citizenship in the United States Court, thus indicating an intention on the part of Congress to reserve to the United States its right to determine the national citizenship of such person.

Congress therefore has provided a judicial method of establishing citizenship by an action brought in a Federal Court; conversely Congress has never consented to bind the United States by any similar proceeding brought in a State Court to which the United States is not a party.

It may be that upon the entire record in this case the appellate administrative authority will decide that appellant's birth in the United States has been established by the evidence. It may also be that should the appellate administrative authority decide otherwise, the Courts on habeas corpus might, upon the whole record, conclude that such a decision was arbitrary. Certainly, however, it cannot be said that the order of the State Court is conclusive. We submit that the Court below was right in its decision, which simply

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[5]8 U.S.C.A. 903. "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person * * * may institute an action * * * in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States."

requires that appellant exhaust the administrative remedies which the statute has provided before attempting to obtain a judicial review of the action of the immigration authorities.

CONCLUSION.

It is beyond controversy that if the appellant was actually born in the United States, he is a citizen of the United States.

Questions of fact, as well as questions of law, in matters of this kind properly come before an Immigration Board of Special Inquiry and before the Attorney General of the United States for their determination. A proceeding to question the legality of their administrative ruling before final action has been taken by the Attorney General of the United States is premature.

The States having delegated to the United States the powers to regulate immigration by Article I, Section 9, Clause 1 of the Constitution of the United States, a federal question arises when a person applies for entry into the United States at a port of entry, and no State can enact legislation which would directly or indirectly restrict the United States in the exercise of the power so granted to it.

Congress, realizing that from time to time questions as to United States citizenship might arise in the

dealings of individuals with Government Agencies and Departments, in Section 503, of the Nationality Act of 1940 (8 U.S.C. 903) has provided a method for securing a declaratory judgment of citizenship in such cases. This was one method whereby appellant might have secured a judicial determination of his claim to United States citizenship.

Another appropriate method would be for appellant to exhaust the administrative remedies which the Immigration statutes have provided and thereafter invoke the review of the Federal Courts on habeas corpus if the final administrative decision were adverse to his claim.

This Honorable Court is not being asked to review or reverse the Order of the Superior Court of the State of California in and for the City and County of San Francisco, dated August 14, 1944, but is asked to make a finding that such order is not binding on the United States because a federal question is involved, and the United States was not a party to the proceeding in which such order was made.

The United States is a sovereign power—it cannot be sued without its consent, and so far as your appellee is advised, no authority has ever been granted by the United States to be made a party to a proceeding such as the one in the instant case. Any state law or proceeding in a state Court where a federal question is involved is not binding on the United States unless it was a party thereto, or consented in some way to be bound thereby.

For the reasons stated, the appellee is therefore of the belief that the opinion of the Court below should be affirmed.

Dated, San Francisco,
June 15, 1948.

Respectfully submitted,

FRANK J. HENNESSY,
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EDGAR R. BONSALL,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

Sections 10600 to 10607, inclusive, Health and Safety Code of the State of California, read as follows:

Sec. 10600. Grounds for proceedings: State record lacking. If any birth, death or marriage, occurring in this State:

(a) Was not at the time it occurred required by law to be registered; or

(b) Was not registered in conformity with the provisions of law in effect at the time it occurred by the filing of the proper certificate with the local registrar within a period of one year from the date of the event or if such record has been filed but thereafter lost or destroyed, any person beneficially interested in establishing of record the fact of and the time and place of, such birth, death, or marriage may file with the county clerk a verified petition for an order judicially establishing the fact of, and the time and place of, the birth, death, or marriage in either of the following courts:

(1) The superior court of the county in which the birth, death or marriage is alleged to have occurred.

(2) The superior court of the county in which the person whose birth or marriage it is sought to establish is residing; or, if such person has died, the superior court of the county in which such person was domiciled at the date of death.

Sec. 10600.5. Same: Foreign record lacking. If a person, domiciled in this State, was born or married outside of the State, or, if any person domiciled in

this State at the time of his death, died outside of the State, and the birth, death, or marriage was not registered in the State or country in which it occurred, or a certified copy of the record of the birth, death or marriage is not obtainable, any person beneficially interested in establishing of record the fact of the birth, death or marriage, may petition the superior court of the county in which the person, if a living person, resides, or if the person has died, in the county in which he was domiciled at the date of his death, for an order judicially establishing the fact of the birth, death or marriage.

Sec. 10601. Petition: Verification: Allegations. The petition shall be verified and shall contain all the facts necessary to enable the court to determine the fact of and the time and place of the birth, death or marriage upon the proofs adduced in behalf of the petitioner at the hearing.

Sec. 10602. Same: Service of copy on district attorney. At least five days before the date of the hearing, a copy of the petition shall be served upon the district attorney of the county in which the petition is filed, together with a notice of the time and place of the hearing and he may appear at the hearing and oppose the making of the order.

Sec. 10603. Time for hearing: Place: Continuance. Upon the filing of the petition a hearing shall be fixed by the clerk and at the convenience of the court set at a time not less than 5 nor more than 10 days after the filing of the petition. The hearing may be held in chambers. The court, for good cause, may continue the hearing beyond the 10-day period.

Sec. 10604. Filing fee: Court by which heard. The fee for filing the petition shall be three dollars ($3) one dollar ($1) of which shall go to the law library fund of the county. In counties having more than one superior court judge, the petition may be heard by any judge thereof hearing probate matters, or if a probate department has been designated for hearing probate matters, the clerk shall assign the matter to the probate department for hearing.

Sec. 10605. Hearing: Proof: Order. If, upon the hearing, the allegations of the petition are established to the satisfaction of the court, the court may make an order determining that the birth, death, or marriage did in fact occur at the time and place shown by the proofs adduced at the hearing.

Sec. 10606. Form and contents of order. The order shall be made in the form and upon the bank prescribed and furnished by the State registrar and only one birth, death or marriage shall be included in it.

Sec. 10607. Effective date of order: Filing. The order shall become effective upon a filing of a certified copy (a) with the local registrar of vital statistics of the district in which the birth or death occurred, if it occurred in this State, or in the case of marriage with the county recorder. If the event occurred outside the State, the order shall be filed with the registrar of the district or the county recorder of the county, as the case may be, in which the petitioner resides, and (b) with the State Registrar of Vital Statistics.